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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JACKSON, Defendant and Appellant.	A146694 (San Mateo County Super. Ct. No. SC083443A)

Defendant Anthony Jackson appeals a sentence imposed on him after he pleaded no-contest to a felony charge of vehicular burglary, contending his "same judge" sentencing right under *People v. Arbuckle* (1978) 22 Cal.3d 749 (*Arbuckle*) was violated. He argues because he noted on court paperwork that he did not waive his right to be sentenced by the same judge who took his plea, his sentence should be reversed and his case remanded to the original judge for a new sentencing hearing. In spite of this notation on the court paperwork, Jackson's attorney orally waived his *Arbuckle* right during the plea hearing and Jackson failed to raise the issue at sentencing. We conclude Jackson had no *Arbuckle* right, and even if he did, he waived or forfeited it by his silence. We therefore affirm.

I. BACKGROUND

Jackson was charged in an information with (1) a vehicular burglary (Pen. Code, § 460, subd. (b)) (count one), (2) a misdemeanor receiving stolen property (Pen. Code, § 496, subd. (a)) (count two), and (3) a misdemeanor possession of burglar's tools (Pen. Code, § 466) (count three). The information also alleged the commission of three prior

strikes under Penal Code section 1170.12, subdivision (c)(1) and one prior prison term under Penal Code section 667.5, subdivision (b).

This case arose from an incident in Daly City. A witness observed Jackson and another person peering into cars in a shopping mall parking lot. When the witness approached, he saw Jackson "hanging out of the smashed front passenger window" of a truck. Jackson then entered a waiting car and the car sped off. Police stopped the car shortly thereafter. The witness identified Jackson as the person he saw at the smashed window of the truck. The truck's owner responded to the scene and told police that his cell phone, which had been inside the truck, was missing. When police searched the car, they found the missing cell phone. Jackson admitted to police that he broke the truck's window and took the cell phone. He also admitted to possessing a "window punch," a device used to break vehicle windows.

After initially pleading not guilty, Jackson entered a change of plea before Commissioner Susan M. Jakubowski on August 3, 2015. Per a negotiated plea deal, Jackson pleaded no contest to the vehicular burglary and admitted one prior strike, and the balance of the information was dismissed. The sentence under the plea agreement left some discretion to the sentencing judge, with agreed-upon conditions of a "32-month top and refer to probation with a *Harvey* waiver for dismissed counts for restitution" and "*Romero* consideration."[1]

Jackson filled out and signed a Local Court Form CR-35 entitled "Declaration Concerning a Plea or Change of Plea to Guilty or Nolo Contendere; Finding and Order (Felony)." One of the line items on the form states, "I ____ waive my right to be sentenced by the judge taking my plea and understand sentencing may occur before another judge." In the blank space, the words "DO NOT" were handwritten. The form was also signed by Jackson's trial counsel, the deputy assistant district attorney, and the commissioner.

[1] See *People v. Harvey* (1979) 25 Cal.3d 754; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

During the plea colloquy, the commissioner noted that she had received "a waiver of rights for entry of plea form." Jackson confirmed that he had read, understood, and signed the form.

Towards the end of the plea colloquy, the commissioner asked, "Is there an *Arbuckle* waiver as to me with the understanding that he'll be sentenced by Judge Davis?" Jackson's trial counsel responded, "Yes, Your Honor."

Jackson was sentenced by Judge Leland Davis, III on September 25, 2015. The same defense attorney who appeared for Jackson at the plea also appeared at the sentencing. Neither party mentioned an *Arbuckle* issue at the time of sentencing. On the record, Jackson spoke to the judge about the circumstances of his crime and his career potential. Judge Davis denied Jackson's motion to strike the prior strike and sentenced Jackson to a term of 32 months in state prison.

II. DISCUSSION

A. Standard of Review

We review this case *de novo* because the issue presented involves the applicability of a legal rule to an undisputed set of facts, and thus is subject to *de novo* review. (See *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1367; *Estate of Kampen* (2011) 201 Cal.App.4th 971, 985.)

B. Jackson's Claim of a Violation of His *Arbuckle* Right Fails.

Jackson claims his *Arbuckle* right was violated when he was a sentenced by a different judge than the one who took his plea. "As a general principle, . . . whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea." (*Arbuckle, supra,* 22 Cal.3d at pp. 756–757.)

The Court of Appeal has developed a two-step analysis for addressing *Arbuckle* violation claims. (*People v. Serrato* (1988) 201 Cal.App.3d 761, 764–766.) First, the court asks if the defendant has an *Arbuckle* right, based on whether the record

demonstrates an affirmative basis for the defendant to reasonably expect that he will be sentenced by the judge who accepted his plea. (*Id*. at p. 764.) If so, then the defendant does have an *Arbuckle* right, and the court proceeds to the second step in the analysis. The court then asks if the defendant waived the *Arbuckle* right. (*Ibid*.) If the defendant did not waive the *Arbuckle* right and was sentenced by a judge other than the one who took the plea, then the defendant is entitled to be resentenced by the original judge. (See *Arbuckle, supra,* 22 Cal.3d at p. 757.)

1. *Jackson had no reasonable expectation that he would be sentenced by Commissioner Jakubowski.*

Arbuckle establishes a general principle that retaining the same judge for sentencing is an implied term of a plea bargain. For the right to arise, however, the record must show some basis for the defendant to expect "same judge" sentencing. "It is not always an implied term of a plea bargain that the judge who accepts the plea will impose the sentence; rather, the record must affirmatively demonstrate some basis upon which a defendant may reasonably expect that the judge who accepts the plea will retain sentencing discretion." (*People v. Ruhl* (1985) 168 Cal.App.3d 311, 315; see also *In re Mark L.* (1983) 34 Cal.3d 171, 177; *People v. Guerra* (1988) 200 Cal.App.3d 1067, 1071–1072; *In re James H.* (1985) 165 Cal.App.3d 911, 919–920.) The record must reflect "an actual assumption by the court and parties that the officer taking the plea would have final and exclusive dispositional authority." (*In re Mark L., supra,* 34 Cal.3d at p. 177.)

Appellate courts review the record for indications that would suggest to a defendant that the judge taking the plea would also preside over sentencing. In one case, the court found that a defendant did have an *Arbuckle* right where "in scheduling the sentencing hearing, [the judge] indicated he would be the one to sentence defendant." (*People v. Letteer* (2002) 103 Cal.App.4th 1308, 1314.) In other cases, the indication is less overt, but the courts still find that the condition was implied by the court's statements during the plea colloquy. When a judge during the plea colloquy discusses sentencing using personal pronouns (e.g., "I may impose a term of probation"), the courts find that

the defendant does have a reasonable expectation that the same judge will impose the sentence. (See *Arbuckle, supra,* 22 Cal.3d at p. 756, fn. 4; see also *Serrato, supra*, 201 Cal.App.3d at pp. 764–765; *In re Mark L., supra,* 34 Cal.3d at p. 177.)

The record here is clear: Commissioner Jakubowski indicated she would not be imposing the sentence.[2] During the plea colloquy, Commissioner Jakubowski asked, "Is there an *Arbuckle* waiver as to me with the understanding that he'll be sentenced by Judge Davis?" Defendant's trial counsel responded, "Yes, Your Honor." This exchange would have made it clear to Jackson that he would not be sentenced by the commissioner. Further, throughout the plea colloquy, Commissioner Jakubowski did not use personal pronouns or any other words that implied that she would be the sentencing judge. By the end of the plea hearing, it would be patently unreasonable to assume that Commissioner Jakubowski would be the sentencing judge. Because Jackson had no reasonable expectation that Commissioner Jakubowski would sentence him, he had no *Arbuckle* right to waive.

2. *Even assuming arguendo that Jackson had an Arbuckle right, he waived it here.*

Even if Jackson did possess an *Arbuckle* right, as he appeared to assume in filling out the court's paper form, his conduct at the plea hearing and at sentencing nonetheless supports the conclusion that he subsequently waived it.

At the plea hearing, Jackson remained silent as his attorney waived the *Arbuckle* right. The commissioner used clear language when inquiring about the *Arbuckle* waiver, referencing that "he'll be sentenced by Judge Davis." Jackson said nothing.

Jackson suggests that the court should have taken a personal *Arbuckle* waiver. He provides no authority for the proposition that an *Arbuckle* waiver must be personally made by the defendant. Applying *Arbuckle* in a juvenile case, the Court of Appeal held that there was no such requirement. (*In re James H., supra,* 165 Cal.App.3d at p. 921.)

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[2] Commissioners may act as a "temporary judge" by the stipulation of the parties and take a criminal defendant's plea and sentence. (Cal. Const, Art. VI § 21; see also *People v. Tijerina* (1969) 1 Cal.3d 41, 48.)

Jackson also contends that the paper plea form was a clear invocation of the *Arbuckle* right. But Jackson's subsequent conduct suggests that he did not expect any right to "same judge" sentencing. Jackson's paper form was completed before the plea colloquy and then given to Commissioner Jakubowski. During the plea colloquy, Jackson's trial counsel represented to the court that there was an *Arbuckle* waiver. Jackson cites to no authority for the proposition that his counsel's express *Arbuckle* waiver to the court is superseded by court paperwork filled out prior to the plea colloquy. The court relied on the statement of defense counsel as accurate, and Jackson did not correct his counsel or alert the court to the discrepancy.

Furthermore, at sentencing, Jackson waived his *Arbuckle* right when he failed to object to being sentenced by Judge Davis.

There is a split among the district courts of appeal on the question of whether silence at sentencing automatically waives the defendant's *Arbuckle* right. (*People v. Walker* (1991) 54 Cal.3d 1013, 1025–1026 & fn. 2.) The Third and Fourth Districts have held that silence at sentencing is always a waiver, but the Fifth District has held mere silence alone is not an automatic waiver of the *Arbuckle* right. In *Serrato,* the Third District held that a defendant's silence at sentencing waives his *Arbuckle* claim on appeal. (*Serrato, supra*, 201 Cal.App.3d. at p. 765.) The court reasoned that if a defendant believes his plea bargain is based on the understanding that sentence will be imposed by the judge who accepted his plea, then the defendant would object at sentencing when faced with a new judge. The court writes, "we conclude, when faced with a different sentencing judge, a defendant must object at that time or waive his *Arbuckle* rights." (*Ibid*.) Two years later, in *People v. Adams* (1990) 224 Cal.App.3d 1540, 1544 (*Adams*), the Fourth District adopted *Serrato*'s holding.[3]

[3] Substantial policy considerations militate in favor of a rule requiring a defendant to speak up at the earliest opportunity. As the Fourth District Court of Appeal has written, "we express our strong preference for the rule that a defendant who by implication from the plea is expecting sentencing by the same judge register his objection as he stands before a second judge for sentencing. It is unreasonable to allow such an 'unsatisfied' defendant to stand idly before the second judge all the way through the

The Fifth District took a less categorical approach in *People v. Horn* (1989) 213 Cal.App.3d 701, 709 (*Horn*), where the court held that mere silence at sentencing is not enough to waive the *Arbuckle* right. *Horn*, however, still held that silence at sentencing was relevant. "Although silence does not constitute a waiver of the implied term, a defendant's failure to object is relevant in determining whether the record supports the conclusion that the plea was entered in reliance on the sentencing judge being the same as the judge accepting the plea. [¶] The defendant's failure to object is relevant in determining whether an *Arbuckle* right was ever a term of the plea. A defendant's failure to object when faced with a different sentencing judge suggests he did not enter his plea in reliance on or with the understanding that the judge accepting his plea would also impose sentence." (*Ibid*.)

Here, Jackson's silence at sentencing supports the conclusion he did not believe sentencing by Commissioner Jakubowski was a condition of his plea agreement. Under the approach taken in *Serrato* and *Adams*, the defendant's silence at sentencing would be enough to waive or forfeit his *Arbuckle* right. Yet even following the minority approach in *Horn*, we still conclude that Jackson waived his *Arbuckle* right. While *Horn* found that a defendant's silence at sentencing alone was not enough to constitute a waiver, the court still found that silence at sentencing was only a relevant factor to consider. (*Horn, supra,* 213 Cal.App.3d at p. 709.) Jackson's silence at sentencing, combined with the statement from Commissioner Jakubowski at his plea hearing that Judge Davis would be the sentencing judge, provides a sufficient basis to find that Jackson did not enter his plea in reliance on being sentenced by Commissioner Jakubowski.

We also note that Jackson was not entirely silent at sentencing. He was given an opportunity to speak to the judge on the record and he spoke about his career potential if released. At no time did he indicate that he expected to be appearing before Commissioner Jakubowski, not Judge Davis. If Jackson believed that he was not

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sentencing process and then raise the *Arbuckle* issue for the first time on appeal." (*People v. Guerra*, *supra*, 200 Cal.App.3d at p. 1073.)

receiving the terms of the plea deal to which he had agreed, he should have made his concerns known at that time. We cannot grant him a second chance at sentencing when he avoided all earlier opportunities to rectify the situation.

III. DISPOSITION

The judgment is affirmed.

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.